

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1151

GLENN CHERRY

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

STEWART BLOCK
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties

The parties before this Court are Glenn Cherry (“Cherry”), Appellant; the Federal Communications Commission (“the Commission” or “FCC”), Appellee; and Scott Savage, Receiver for Tama Broadcasting, Inc. (“Receiver” or “Savage”), Intervenor.

B. Rulings Under Review

Percy Squire, Esq., 24 FCC Rcd 2453 (Audio Serv. Div-Media Bur. 2009) (“*Bureau Order*”) (JA 1); *Tama Radio Licenses of Tampa, Florida, Inc. et al.*, 25 FCC Rcd 7588 (2010) (“*Order*”) (JA 4).

C. Related Cases

The *Order* on review has not previously been before this Court.

D. Deferred Appendix

The parties will be using a deferred appendix as permitted by the Court's rules.

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	1
STATEMENT OF JURISDICTION	2
STATUTES AND REGULATIONS	3
COUNTERSTATEMENT OF THE CASE.....	3
COUNTERSTATEMENT OF THE FACTS.....	3
A. Background	3
B. The FCC’s Consideration of the Receiver’s Applications for Involuntary Assignment.....	7
C. The Receiver’s Post-Appointment Conduct	14
SUMMARY OF ARGUMENT.....	17
ARGUMENT	18
I. THE <i>ORDER</i> IS SUBJECT TO REVIEW UNDER THE ARBITRARY AND CAPRICIOUS STANDARD.....	18
II. THE FCC ACTED WITHIN ITS DISCRETION IN ISSUING THE <i>ORDER</i>	19
A. The FCC Correctly Concluded That Cherry’s AFR Was Procedurally Defective.	19
B. As An Alternative Basis For Its Decision, The FCC Acted Within its Discretion in Affirming the Bureau’s Grant of the Receiver’s Applications for Involuntary Assignment.....	24

III.	CHERRY’S RENEWED ATTACKS ON ZWIRN, THE FCC STAFF, AND THE VALIDITY OF THE ENFORCEMENT BUREAU CONSENT DECREE ARE NOT PROPERLY BEFORE THE COURT AND ARE IRRELEVANT.	27
IV.	CHERRY’S PROPOSED RELIEF IS BEYOND THE COURT’S JURISDICTION.	31
	CONCLUSION	33

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>AT&T Corp. v. FCC</i> , 220 F.3d 607 (D.C. Cir. 2000).....	18
<i>Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs</i> , 398 U.S. 281 (1970)	31
* <i>BDPCS, Inc. v. FCC</i> , 351 F.3d 1177 (D.C. Cir. 2003)	18, 19, 22, 23
* <i>Cherry v. D.B. Zwirn Special Opportunities Fund, L.P.</i> , 2010 WL 415313 (M.D. Fla., Jan. 27, 2010)	3, 7, 32
<i>Cherry v. D.B. Zwirn Special Opportunities Fund, L.P.</i> , Case No. 10-10761 (11th Cir.)	7
<i>Cherry v. FCC</i> , 2009 WL 4668405 (M.D. Fla., Dec. 3, 2009).....	16
* <i>D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broad., Inc.</i> , 550 F. Supp. 2d 481 (S.D.N.Y. 2008).....	3, 5, 6, 26
<i>D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broad., Inc.</i> , Index No. 600692/2008 (Sup. Ct. New York County).....	5
* <i>In re Kane</i> , 75 N.Y.2d 511 (1990)	28
<i>Int'l Telecard Ass'n v. FCC</i> , 166 F.3d 387 (D.C. Cir. 1999).....	30
<i>Kidd Communications v. FCC</i> , 427 F.3d 1 (D.C. Cir. 2005).....	26
* <i>La Rose v. FCC</i> , 494 F.2d 1145 (D.C. Cir. 1974).....	25, 28
<i>Listeners' Guild, Inc. v. FCC</i> , 813 F.2d 465 (D.C. Cir. 1987).....	24
<i>Montierth v. FCC</i> , 159 F.3d 636 (D.C. Cir. 1998).....	25
* <i>N.Y. State Dept. of Law v. FCC</i> , 984 F.2d 1209 (D.C. Cir. 1993)	29, 31

<i>Percy Squire Co., LLC. v. FCC</i> , 2009 WL 2448011, (S.D. Ohio, Aug. 7, 2009)	16
<i>Richman Bros. Records, Inc. v. FCC</i> , 124 F.3d 13029 (D.C. Cir. 1997)	30
<i>Serafyn v. FCC</i> , 149 F.3d 1213 (D.C. Cir. 1998)	5
<i>St. Jude Medical, Inc. v. Lifecare Intern, Inc.</i> , 250 F.3d 587 (8th Cir. 2001)	21

Administrative Decisions

* <i>Arecibo Radio Corp.</i> , 101 F.C.C.2d 545 (1985)	24, 26
<i>D.H. Overmyer Telecasting Co., Inc.</i> , 94 F.C.C.2d 117 (1983)	26
<i>Dale Parsons, Jr.</i> , 10 FCC Rcd 2718 (1995)	25
<i>John F. Runner, Receiver</i> , 36 R.R.2d (P&F) 773 (1976)	25
<i>Marcus Cable Assocs., LLC d/b/a Charter Commc'ns</i> , 25 FCC Rcd 4369 (2010)	20
<i>Northwest Broad., Inc.</i> , 12 FCC Rcd 3289 (1997)	24
<i>O.D.T. Int'l (KILU (FM))</i> , 9 FCC Rcd 2575 (1994)	25
<i>Paging Sys., Inc.</i> , 25 FCC Rcd 450 (2010)	20
<i>Percy Squire, Esq.</i> , 24 FCC Rcd 10,669 (Audio Serv. Div. – Media Bur. 2009)	16
<i>Promoting Diversification of Ownership in the Broadcast Services</i> , 23 FCC Rcd 5922 (2008)	23
<i>Red Hot Radio, Inc.</i> , 19 FCC Rcd 6737 (2004)	20
<i>WGPR, Inc.</i> , 10 FCC Rcd 8140 (1995)	5

Statutes and Regulations

	28 U.S.C § 2283.....	31
*	47 U.S.C. § 155(c)(7)	30
	47 U.S.C. § 310(d).....	8
	47 U.S.C. § 402(b)(6)	2
*	47 U.S.C. § 405(a)	23
*	47 C.F.R. § 1.115(b)(2).....	13, 20
	47 C.F.R. § 1.115(b)(2)(i)-(iv)	19
*	47 C.F.R. § 1.115(c).....	14
*	47 C.F.R. § 1.1204(a)(10)	31
	47 C.F.R. § 1.44(e).....	14
	47 C.F.R. § 73.3541	8
	N.Y. C.P.L.R. § 6401	6

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

AFR	Application for Review
Bureau	Media Bureau of the FCC
<i>Bureau Order</i>	<i>Percy Squire, Esq.</i> , 24 FCC Rcd 2453 ((Audio Sys. Div. – Media Bur. 2009) (JA 1)
<i>Enforcement Bureau Order</i>	<i>Tama Broad., Inc.</i> , 24 FCC Rcd 1612 (Enf. Bur. 2009) (JA 7)
FCC or Commission	Federal Communications Commission
FOIA	Freedom of Information Act
JA	Joint Appendix
LMA	Local Marketing Agreement
<i>Order</i>	<i>Tama Radio Licenses of Tampa, Florida, Inc. et al.</i> , 25 FCC Rcd 7588 (2010) (JA 4)
Receiver	Scott Savage, Temporary Receiver for Tama, appointed by the New York Supreme Court, New York County
Tama	Tama Broadcasting, Inc., together with its licensee subsidiaries
Zwirn	D.B. Zwirn Special Opportunities Fund, L.P.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1151

GLENN CHERRY

Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

This proceeding arises out of an application to the Federal Communications Commission (“Commission” or “FCC”) for involuntary assignment of nine radio licenses from subsidiaries of Tama Broadcasting, Inc. (“Tama”) to Scott Savage, a temporary receiver appointed by the New York State Supreme Court in connection with loan default litigation against Tama and its subsidiaries. Over the objection of Appellant Glenn Cherry, a minority shareholder of Tama, the FCC’s Media Bureau granted the application. *See Percy Squire, Esq.*, 24 FCC Rcd 2453 (Audio Sys.

Div. – Media Bur. 2009) (“*Bureau Order*”) (JA 1). Cherry then filed an Application for Review (“AFR”) asking the full Commission to review the *Bureau Order*. In the *Order* before the Court, the Commission dismissed Cherry’s AFR due to significant procedural defects. *Tama Radio Licenses of Tampa, Florida, Inc. et al.*, 25 FCC Rcd 7588 (2010) (“*Order*”) (JA 4). As an alternative basis for its decision, the Commission rejected Cherry’s claim on the merits for the reasons stated by the staff in the *Bureau Order*. *Id.*, ¶ 2 (JA 5).

The questions presented are:

(1) Whether the FCC abused its discretion in dismissing Cherry’s AFR as procedurally defective because the AFR failed to “specify with particularity” the grounds on which it sought review; and

(2) If not, whether the FCC abused its discretion in its alternative ruling on the merits upholding the Bureau’s grant of the receiver’s application for involuntary assignment of Tama’s radio licenses in light of the Commission’s longstanding policy of accommodating the appointment of receivers by state courts.

STATEMENT OF JURISDICTION

The FCC released the *Order* on June 1, 2010. (JA 4). This Court has jurisdiction under Section 402(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b)(6).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the addendum to this brief.

COUNTERSTATEMENT OF THE CASE

This appeal is Cherry's latest legal challenge in a long-running dispute that has spawned litigation in multiple courts and resulted in half a dozen orders by the FCC and its staff. Having lost to date in every court in which he has litigated, Cherry now challenges before this Court the FCC's *Order* dismissing his Application for Review from a staff decision granting applications for an involuntary assignment of nine radio broadcast licenses held by subsidiaries of Tama to a temporary receiver, Scott Savage ("Savage" or the "Receiver").

COUNTERSTATEMENT OF THE FACTS

A. Background

An understanding of the events that led to the Receiver's appointment and his application for an involuntary transfer of Tama's radio broadcast licenses is helpful to place this proceeding in its proper context.¹

The Zwirn Loan. Tama borrowed \$21 million from D.B. Zwirn Special Opportunities Fund, L.P. ("Zwirn") in 2004 to enable Tama to acquire radio

¹ These facts are set forth in *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broad., Inc.*, 550 F. Supp. 2d 481 (S.D.N.Y. 2008), and *Cherry v. D.B. Zwirn Special Opportunities Fund, L.P.*, 2010 WL 415313 (M.D. Fla., Jan. 27, 2010), *appeal pending*, Case No. 10-10761 (11th Cir.).

stations and refinance its existing debt. *See D.B. Zwirn Special Opportunities Fund, L.P.*, 550 F. Supp. 2d at 483. The amended financing documents provided that, in the event of a default, Zwirn could foreclose on the pledged collateral, which included all of the assets of Tama and its licensee subsidiaries. *Id.* Among these assets were any proceeds from the sale of the nine FCC radio licenses held by Tama's subsidiaries. *Id.* The amended financing documents also provided that, in case of a default, Tama consented to the appointment of a temporary receiver appointed under state law to hold the assets, operate the radio stations, and sell the licenses, provided that the receiver obtained prior FCC approval before taking control of the licenses. *Id.*

In 2006, Tama fell behind on its payment obligations under the loan, and Zwirn declared a default. *See D.B. Zwirn Special Opportunities Fund, L.P.*, 550 F. Supp. 2d at 483. After Tama acknowledged its default and Zwirn deferred pursuing its remedies, Zwirn and Tama executed a restructuring agreement in 2007. *Id.* at 484. Under that agreement, Tama entered into a Local Marketing

Agreement (“LMA”) that allowed an affiliate of Zwirn to purchase programming time on the Tama stations. *Id.*²

Zwirn’s State Court Breach of Contract Action. In 2008, Zwirn filed a complaint in New York State Supreme Court for breach of contract and judicial foreclosure on the loan collateral, including the nine Tama licenses. *D.B. Zwirn Special Opportunities Fund, L.P. v. Tama Broad., Inc.*, Index No. 600692/2008 (Sup. Ct. New York County). Zwirn also sought the appointment of a temporary receiver in accordance with the terms of the loan. *Id.*; *see also D.B. Zwirn Special Opportunities Fund, L.P.*, 550 F. Supp. 2d at 484-85. Shortly before the appointment of a receiver, Tama unsuccessfully sought to remove the case to federal court. *See id.* at 485, 486-89 (denying motion for removal on jurisdictional grounds). In light of the delay caused by the unsuccessful removal, the federal district court provided the state court with its draft order granting the appointment

² Under an LMA, a licensee offers its airtime to a third-party in exchange for programming and compensation. *See WGPR, Inc.*, 10 FCC Rcd 8140, 8141 (1995), *vacated on other grounds sub nom., Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998). LMAs have been used by broadcasters for decades and are permitted by the FCC if certain conditions are satisfied. *WGPR, Inc.*, 10 FCC Rcd at 8141-42. A third-party broadcaster’s operations under an LMA do not violate the Communications Act’s ban on unauthorized transfers of control so long as the ultimate control over the broadcaster’s programming and operations remains with the licensee. *Id.* at 8142.

of a temporary receiver and rejecting Tama's objections to the appointment, *id.* at 489-94.³

The State Court Receiver Appointment. Upon return to state court, the court granted Zwirn's request for appointment of Scott Savage as the temporary receiver pursuant to state law, N.Y. C.P.L.R. § 6401. *See* State Court Appointment Order, September 5, 2008 (JA 30). Although Savage (a resident of Texas) was not on the court-approved list of receivers in New York, the New York Supreme Court approved his appointment "given his 34 [years of] experience in the radio industry and due to the inability of either party to identify any other suitable Receiver." *Id.* at 2 (JA 31). The appointment order specified the Receiver's responsibilities, including his continued operation of the business during the litigation and authority to sell assets for the benefit of the estate, subject to further court order and approval by the FCC. *Id.* at 4 (JA 33).⁴

Cherry's Litigation Against Zwirn in Federal Court in Florida. After the Receiver's appointment, Appellant Cherry, a minority shareholder of Tama, filed suit against Zwirn and Tama – but not the Receiver – in federal court in Florida.

³ In its order remanding the case to state court, the federal district court noted that it found Tama's litigation conduct to be "deeply troubling," including its "numerous tactics that appear motivated by a desire to delay the resolution of plaintiff's breach of contract claim for as long as possible." 550 F. Supp. 2d at 488-89.

⁴ The appointment order was not appealed, and Zwirn's breach of contract action remains pending before the New York court.

See Cherry v. D.B. Zwirn Special Opportunities Fund, L.P., 2010 WL 415313 (M.D. Fla., Jan. 27, 2010). Joined by other plaintiffs, Cherry asserted various causes of action challenging Zwirn's actions in lending money to Tama, foreclosing on the collateral, and allegedly retaliating against Cherry as a whistleblower. *See id.* The court granted Zwirn's motion to dismiss the complaint, without leave to amend, observing that:

Plaintiffs' objection is but another filing on the mountain of paperwork caused by Plaintiffs' intentional and vexatious litigation tactics designed solely to multiply litigation that was resolved by the Supreme Court of the State of New York's appointment of a temporary receiver to prevent the Plaintiffs from further depleting the value of Tama's assets.

Id. at *2 (internal quotation marks and footnote omitted).⁵

B. The FCC's Consideration of the Receiver's Applications for Involuntary Assignment.

The Receiver's Applications. As required by the New York court's appointment order, the Receiver promptly filed applications under section 310(d)

⁵ Cherry's appeal from the district court's dismissal order remains pending. *See Cherry v. D.B. Zwirn Special Opportunities Fund, L.P.*, No. 10-10761 (11th Cir.).

of the Communications Act, 47 U.S.C. § 310(d),⁶ for assignment of the nine radio licenses. *See* Form 316 Application for Involuntary Assignment of Tama Radio Licenses of Jacksonville, FL, Inc. (JA 38); Form 316 Application for Involuntary Assignment of Tama Radio Licenses of Savannah, GA, Inc. (JA54); Form 316 Application for Involuntary Assignment of Tama Radio Licenses of Tampa, FL, Inc. (JA 69).⁷

Cherry's Informal Objection and the Receiver's Response. On October 17, 2008, Cherry filed an informal objection to each of the Receiver's applications. *See* Objection to 316 filing of Tama Broadcasting, Inc. (JA 85).⁸ Cherry asserted that the FCC's Enforcement Bureau was investigating a complaint he and his

⁶ Section 310(d) in pertinent part provides: "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d).

⁷ Consistent with the FCC's rules, each application attached a copy of the state court appointment order. Form 316 applications for involuntary assignment to a receiver are "short form" applications that do not require a full administrative hearing on the qualifications of the assignee. *See* 47 C.F.R. § 73.3541 (permitting use of Form 316 for involuntary transfers).

⁸ Cherry was represented by Percy Squire, Esq., who served as co-counsel for Tama in the case that Tama unsuccessfully sought to remove to federal court and as co-counsel for Cherry in his Florida litigation against Zwirn. *See supra* pp. 4-7 & n.3.

brother had filed alleging that Zwiirn's affiliate had illegally assumed control over Tama in violation of section 310(d) of the Communications Act by exceeding its authority under the LMA. Cherry argued that Zwiirn had "orchestrated the appointment of a receiver" to "cover up its . . . ongoing premature assumption of control of the Tama licenses." *Id.* at 2 (JA 86). Cherry also claimed that Zwiirn was "abus[ing]" the "Form 316 process" to "avoid full administrative scrutiny" of its "vociferous and predatory campaign" of taking over radio licenses from their original African-American owners. *Id.* Finally, because the complaint before the Enforcement Bureau was still pending at that time, Cherry requested that the FCC defer action on the Receiver's applications until after the Enforcement Bureau's resolution of the complaint. *Id.* at 4 (JA 88).

Responding to Cherry, the Receiver pointed to the FCC's "long-standing policy of approving involuntary transfers of control or assignment of licenses to court appointed receivers on a *pro forma* basis." Letter from Mark J. Prak to Marlene H. Dortch, Secretary, FCC, October 23, 2008, at 2-3 (JA 89, 90-91).

The Enforcement Bureau's Termination of its Investigation and Dismissal of Cherry's Complaint. On February 17, 2009, the Enforcement Bureau issued an order dismissing Cherry's complaint and concluding its investigation into Cherry's allegations that Zwiirn and its affiliates had violated section 310(d) of the Communications Act by exercising improper control over Tama under the LMA.

See Tama Broad., Inc., 24 FCC Rcd 1612 (Enf. Bur. 2009) (“*Enforcement Bureau Order*”) (JA 7). As part of its order, the Enforcement Bureau adopted a consent decree (JA 10) under which neither Zwirn nor Tama admitted any wrongdoing, but both agreed to establish a plan to monitor their compliance with section 310(d). *Consent Decree*, ¶¶ 8, 9-10 (JA 12, 13). Tama and Zwirn also agreed to make a voluntary contribution to the Treasury of \$18,000 each. *Id.*, ¶ 11 (JA 14). The Enforcement Bureau concluded that the consent decree served the public interest. *Enforcement Bureau Order*, ¶ 3 (JA 8).

The Enforcement Bureau further found that its investigation had raised no substantial or material questions of fact regarding whether Tama and Zwirn possess the basic qualifications to obtain or hold any FCC license or authorization, including the requisite character qualifications. *Enforcement Bureau Order*, ¶ 4 (JA 8). Although terminating its investigation of Zwirn and Tama, the Enforcement Bureau expressly reserved its right to investigate the conduct of Cherry and his brother (*id.*, ¶ 1 n.3), which “raise[d] questions regarding their basic

qualifications to hold or obtain an FCC license or authorization.” *Id.* ¶ 4 n.4 (JA 8).⁹

The Bureau Order Granting the Involuntary Assignment. On February 26, 2009, the Audio Services Division of the FCC’s Media Bureau consented to the assignment of the nine Tama licenses to the Receiver. *See Bureau Order*, 24 FCC Rcd 2453 (JA 1). The Bureau acknowledged the state court’s appointment of the Receiver, adding that “it is well-established that the Commission will accommodate court decrees, such as the instant appointment of the Receiver for the [Tama] Stations, unless a public interest determination compels a different result.” *Bureau Order* at 2455 (JA 3).

⁹ Cherry requested reconsideration of the *Enforcement Bureau Order*. *See* Letter from Percy Squire to Kris Monteith (Enforcement Bureau Chief), dated February 24, 2009 (JA 100). Cherry’s reconsideration request asserted, *inter alia*, that the person executing the consent decree on behalf of Tama was not authorized to act for Tama so that the consent decree was void. *Id.* at 2 (JA 101). Cherry’s request for reconsideration remains pending. Cherry also filed a complaint with the FCC’s Office of General Counsel and Office of Inspector General requesting an investigation of the Enforcement Bureau’s handling of his complaint, alleging that the FCC staff engaged in improper *ex parte* contacts with Zwirn during its investigation. *See* Letter from Percy Squire to P. Michele Ellison (Acting General Counsel) and Kent R. Nilsson (Inspector General), dated February 19, 2009 (JA 102). The Office of General Counsel determined that Cherry’s allegations against the FCC staff were meritless, *see* Letter from Joel Kaufman, FCC Associate General Counsel, to Percy Squire, dated May 8, 2009 (JA 117), and denied Cherry’s petition for reconsideration, *see* Letter from Joel Kaufman, FCC Associate General Counsel to Percy Squire, dated August 28, 2009 (JA 121). Cherry did not seek further administrative or judicial review of the Office of General Counsel’s rulings.

The Bureau also recognized that Cherry had asked it to “review the progress of the Enforcement Bureau investigation” before acting on the assignment applications, and that the Enforcement Bureau had since completed its investigation, adopted a consent decree, and found that the investigation had raised no substantial or material questions as to whether Tama possesses the basic qualifications to hold or obtain FCC licenses. *Bureau Order* at 2454-55 (JA 2-3). The Bureau accordingly granted the Receiver’s assignment applications, finding the assignment of the licenses to be consistent with the public interest, convenience and necessity. *Id.* at 2455 (JA 3).

Cherry’s Application for Review. On March 24, 2009, Cherry filed what purported to be an Application for Review (“AFR”) in which he asked the full Commission to review the Bureau’s decision and further asked the Commission to stay the assignment of the licenses to the Receiver and any further transfers of the licenses. Application for Review (JA 125). Cherry’s AFR listed three “questions” for review¹⁰ and attached various prior orders and filings as “Exhibits,” (JA 130-

¹⁰ The listed questions (quoted here in full) were (AFR at 3, JA 127):

1. Whether the Tama director that consented to appointment of a Receiver had authority to act;
2. Whether the creditor that requested appointment of the Receiver, D.B. Zwirn Special Opportunities Fund, L.P., had violated federal communications law by:

- a) Assuming premature control of Tama; and

195), but failed to present any facts or argument in support of review. Nor did Cherry make any attempt to connect the questions presented to the issue he had raised in his original informal objection to the Receiver's assignment applications.

The Receiver filed an objection to the AFR (JA 196), pointing out that Cherry's filing had failed to specify with particularity any of the five factors under the Commission's rules that justify further administrative review by the Commission, but instead provided a "laundry list of speculative questions" with no reference to any specific findings of fact or conclusions of law. *Id.* at 2 (JA 197).

The Order on Review. The Commission dismissed the AFR, *Order*, ¶ 4 (JA 6) on procedural grounds for failing to comply with 47 C.F.R. § 1.115(b)(2), which requires an applicant seeking Commission review of staff action to "specify with particularity" the grounds on which consideration by the full Commission is warranted, *id.*, ¶ 2 (JA 5). The Commission explained that Cherry had merely referenced his prior submissions and that "[t]he Commission is not required to sift through [the] applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review." *Id.* Moreover, to the extent that Cherry raised new issues on review, the Commission further explained that his

b) Misrepresenting to the FCC the degree of D.B. Zwirn's alien ownership. (See Dept. of Justice Letter, February 27, 2009, Ex 5).

3. Litigation is pending in the M.D. Florida concerning D.B. Zwirn's violation of the Equal Credit Opportunity Act in connection with broadcast lending and predatory lending.

application was subject to dismissal for failure to comply with Section 1.115(c), 47 C.F.R. § 1.115(c), which bars the grant of an AFR that raises new questions of law or fact. *Id.* The Commission concluded: “Accordingly, IT IS ORDERED, that the application for review of Dr. Glenn Cherry and Charles Cherry, Esq. filed on March 31, 2009, IS DISMISSED.” *Id.* ¶ 4 (upper case letters in original) (JA 6).

As an alternative basis for rejecting Cherry’s AFR, the Commission concluded that the *Bureau Order* “properly decided the matters raised below” and stated that “we uphold the staff decision for the reasons stated therein.” *Order*, ¶ 2 (JA 5). Finally, the Commission also dismissed Cherry’s request for a stay of all transfers of Tama licenses. *Id.*, ¶ 3 (JA 5). The Commission noted that Cherry provided no support for his request, and that the request was procedurally defective in any event because it was not filed as a separate pleading as required by 47 C.F.R. § 1.44(e). *Id.* (JA 5-6).

C. The Receiver’s Post-Appointment Conduct

Pursuant to his state court mandate, the Receiver has been operating the Tama radio stations since release of the *Bureau Order* and has sought to sell the licenses to third parties. For example, on April 6, 2009, the Receiver filed an application for the voluntary assignment of one of the licenses to WRGO-FM Radio, LLC d/b/a Savannah Radio (JA 203), and on April 27, filed an application

for voluntary assignment of three of the licenses to Family Broadcasting, LLC. (JA 257). Neither of these entities has ties to Zwirn or its affiliates.

Although Zwirn had no involvement in the proposed sales, Cherry nevertheless filed objections to the Receiver's request for FCC approval of the assignment of the licenses to the new purchasers. Informal Objection to Application for Voluntary Assignment (JA 315; JA 342) . In each instance, Cherry filed a one sentence objection accompanied by a copy of a Freedom of Information Act (FOIA) complaint that Cherry had filed in federal district court in Florida.¹¹ In that FOIA litigation, Cherry sought an order enjoining the FCC from granting any request by the Receiver to assign the licenses to third parties until the agency turns over documents submitted by Zwirn in connection with the Enforcement Bureau's investigation. Cherry FOIA Complaint, ¶ 32 (JA 325). He also reiterated his claims that Zwirn had unlawfully taken control over Tama under the LMA; challenged the authority of the Tama director who signed the Enforcement Bureau consent decree; and attacked the FCC staff's handling of its investigation into Cherry's charges against Zwirn. *Id.* ¶¶ 6-8, 14-29 (JA 320-21, 321-325). The District Court granted the FCC's motion to dismiss the FOIA complaint, *Cherry v.*

¹¹ *Cherry v. FCC*, No. 8:09-cv-00680-CVM-MAP (M.D. Fla.) ("Cherry FOIA Complaint").

FCC, 2009 WL 4668405, *3 (M.D. Fla., Dec. 3, 2009), and Cherry did not appeal that decision.¹²

On August 11, 2009, the FCC staff issued an order consenting to the assignment of the licenses to the new purchasers from the Temporary Receiver. *See Percy Squire, Esq.*, 24 FCC Rcd 10,669 (Audio Serv. Div. – Media Bur. 2009) (JA 24). After noting the various procedural defects in Cherry’s pleadings, *id.* at 10671 (JA 26), the staff ruled that Cherry had raised no material objections to the purchasers’ acquisition of the licenses. *Id.* at 10672 (JA 27). The staff further recognized that its action simply constituted the FCC’s “consent” to transfer of the licenses, and that Cherry remained free to challenge the sale in the New York court that was supervising the Receiver’s disposition of the loan collateral. *Id.* at 10673 (JA 28).¹³ The staff concluded that Cherry’s objections were “frivolous and

¹² Cherry’s attorney filed a separate FOIA proceeding for the requested documents in a different court, and also sought to enjoin the FCC from acting on the Receiver’s application for sale of four of the Tama licenses. The attorney’s FOIA case, filed in the name of his law firm, likewise was dismissed. *Percy Squire Co., LLC. v. FCC*, 2009 WL 2448011, *5 (S.D. Ohio, Aug. 7, 2009).

¹³ The staff also noted that the question whether the Tama director was authorized to execute the consent decree on behalf of Tama was “more appropriately resolved by a local court of competent jurisdiction.” 24 FCC Rcd at 10,673 (footnote omitted) (JA 28).

obstructive,” and admonished Cherry for his attempts to further delay the proceeding. *Id.* Cherry did not seek further review of the staff order.¹⁴

SUMMARY OF ARGUMENT

The FCC acted well within its discretion in dismissing Cherry’s Application for Review for blatant procedural defects because the AFR failed to “specify with particularity” the grounds on which Cherry claimed that review by the full Commission was warranted and also impermissibly raised new arguments that Cherry had not previously presented to the Bureau. That holding provides a sound and sufficient basis for the Court to affirm the *Order* on review. Indeed, Cherry does not even attempt to rebut the FCC’s conclusion that his application was procedurally barred. He therefore has waived any claim that the Commission improperly dismissed his AFR on procedural grounds.

Even if the FCC had abused its discretion in reaching that conclusion, the Court should affirm on the alternative and independent ground that the FCC reasonably found that the staff had correctly granted the Receiver’s applications for involuntary assignment of the licenses. The staff action was consistent with the

¹⁴ Although the FCC consented to the requested assignments, the proposed assignment of the three licenses to Family Broadcasting, LLC ultimately was not consummated due to problems with financing. *See* Non-Consummation Letter, September 3, 2010 (JA 369). On October 19, 2010, the Receiver filed a new application for consent for voluntary assignment of one license to Cortona Media, LLC (which also is not affiliated with Zwirn) (JA 370). That application remains pending.

FCC's longstanding policy of accommodating the appointment of receivers by state courts, and Cherry fails to establish otherwise.

Cherry's other claims are likewise meritless. Most of these claims are not properly before this Court, and none of them has any bearing on the issue in this case—the involuntary assignment of the licenses to the court-appointed Receiver. In short, these claims fare no better here than they did in the myriad other proceedings in which Cherry unsuccessfully asserted them.

ARGUMENT

I. THE *ORDER* IS SUBJECT TO REVIEW UNDER THE ARBITRARY AND CAPRICIOUS STANDARD.

The Court reviews “an agency’s dismissal of pleadings on procedural grounds under the familiar standards of the Administrative Procedure Act, setting aside such dismissals only if they are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183 (D.C. Cir. 2003). This “[h]ighly deferential” standard of review “presumes the validity of agency action;” the Court “may reverse only if the agency’s decision is not supported by substantial evidence, or the agency has made a clear error [of] judgment.” *AT&T Corp. v. FCC*, 220 F.3d 607, 616 (D.C. Cir. 2000) (internal

quotation marks omitted). Cherry concedes that the arbitrary and capricious standard “is the standard of review for all issues raised herein.” Cherry Br. 19.

Because each of the alternative grounds on which the FCC relied supports its grant of the assignment applications, the *Order* can be set aside only if Cherry establishes both (1) that the FCC’s dismissal of his AFR on procedural grounds was arbitrary and capricious, *and* (2) that the FCC’s affirmance of the staff’s *Bureau Order* also was arbitrary and capricious. *See BDPCS, Inc. v. FCC*, 351 F.3d at 1183 . As shown below, Cherry fails on both counts.

II. THE FCC ACTED WITHIN ITS DISCRETION IN ISSUING THE *ORDER*.

A. The FCC Correctly Concluded That Cherry’s AFR Was Procedurally Defective.

A person aggrieved by a staff order may file an AFR seeking review by the full Commission on one or more of the following grounds: (1) the action taken conflicts with “statute, regulation, case precedent, or established Commission policy”; (2) a previously unresolved question of law or policy is involved; (3) the action involves application of a precedent or policy that should be overturned or revised; (4) an erroneous finding as to an important or material question of fact has occurred; or (5) there has been “[p]rejudicial procedural error.” 47 C.F.R. § 1.115(b)(2)(i)-(iv). The FCC’s rules require that an AFR “specify with particularity” which of those grounds justifies review of the staff action by the

Commission. 47 C.F.R. § 1.115(b)(2); *see Marcus Cable Assocs., LLC d/b/a Charter Commc'ns*, 25 FCC Rcd 4369, 4372 (2010). An AFR must further explain why review is appropriate, providing specific supporting facts and legal arguments. *See Red Hot Radio, Inc.*, 19 FCC Rcd 6737, 6745 n.63 (2004) (rejecting applicant's "kitchen sink" approach, which purported to incorporate by reference all of its prior pleadings and arguments, and ruling that applicant's AFR must set forth fully its argument and all underlying relevant facts); *Paging Sys., Inc.*, 25 FCC Rcd 450, 452-53 (2010) (declining to review matters in the record outside of the specific issues raised for review).

As the FCC found, Cherry failed to comply with Section 1.115(b)(2). *See Order*, ¶ 2 (JA 5). Cherry made no attempt to explain which of the five bases listed in the rule supported his application, nor did he provide any supporting facts or legal argument. Rather, he "merely listed the issues he want[ed] the [full] Commission to resolve" and purported to "'incorporate[] by reference' arguments raised before the Enforcement Bureau in another proceeding." *Id.*; *see also* Application for Review at 3 (JA 127) (listing his previously litigated claim that Zwirn improperly took control of the Tama licenses and raising for the first time three new issues that were neither raised in his informal objection nor passed on by

the Media Bureau).¹⁵ Cherry also attached to his AFR an assortment of documents from his prior filings in various fora, but again failed to explain the relevance of any of these documents.

Faced with such an inadequate request for relief, the FCC determined that Cherry had failed to comply with Section 1.115(b) and that his AFR therefore was “subject to dismissal.” *Order*, ¶ 2 (JA 5). As the agency explained, it “is not required to sift through an applicant’s prior pleadings to supply the reasoning that [its] rules required to be provided in the application for review.” *Id.*; *cf. St. Jude Medical, Inc. v. Lifecare Intern, Inc.*, 250 F.3d 587, 596 (8th Cir. 2001) (“The District Court was not required to sift through all of the materials to find support for [litigant’s] claim”). In light of these significant procedural flaws, the Commission held that Cherry’s application for review “IS DISMISSED.” *Order*, ¶ 4 (upper case letters in original) (JA 6).

The Commission’s approach was reasonable and appropriate for efficient adjudication of claims before it. As an analogy to appellate litigation, consider a hypothetical situation where an appellant filed a brief containing only a bare list of

¹⁵ The three new issues were: whether Zwirn misrepresented its foreign ownership status to the FCC; whether the Tama director that consented to appointment of a Receiver had authority to act; and whether Zwirn violated the “Equal Credit Opportunity Act” in its loans to Tama. *See Application for Review* at 3 (JA 127). Cherry made no attempt to explain how these new issues related to the assignment of the Tama licenses to the Receiver or to any alleged error in the *Bureau Order*.

the questions presented for review – with no statement of the case, no statement of the facts, and no argument. Rather than include those essential sections, the appellant instead purported to support its appeal by appending to its brief hundreds of pages of documents from various other proceedings, thereby leaving to the Court the daunting task of sorting through the documents in an attempt to divine the appellant’s arguments. No court would countenance such an unworkable approach. Likewise, the FCC acted reasonably in refusing Cherry’s attempt to take the same flawed approach before the agency in this case. Accordingly, the Court should affirm the FCC’s decision to dismiss Cherry’s AFR review for fatal procedural defects. *Order*, ¶ 4 (JA 6).

The FCC also correctly concluded (*Order*, ¶ 2 (JA 5)) that the AFR asserted new matters that Cherry had failed to raise before the FCC staff and therefore were not properly presented to the full Commission under section 1.115(c). *See BDPCS, Inc.*, 351 F.3d at 1184. For example, Cherry’s informal opposition to the Receiver’s applications for assignment made no mention of his claim – made for the first time in his AFR – that the signature for Tama on the application was unauthorized. Cherry had ample opportunity to raise that claim in his informal

objection filed with the Media Bureau, and he made no attempt in his AFR to explain his belated assertion of the claim.¹⁶

The FCC's dismissal of the AFR as procedurally defective based on Cherry's blatant failure to comply with the FCC's rules provides a sound and sufficient basis for the Court to affirm the *Order*. "The Commission abuses its discretion when it arbitrarily violates its own rules, not when it follows them." *BDPCS, Inc.*, 351 F.3d at 1184. Cherry's brief does not even mention – much less address – the Commission's dismissal based on the procedural infirmities in his AFR. Cherry has thus waived any claim that the Commission improperly dismissed his AFR on procedural grounds – an issue he must win in order to overturn the *Order*. *See BDPCS, Inc.*, 351 F.3d at 1183.

¹⁶ In addition to the new matters improperly raised in the AFR, Cherry's brief on appeal raises still more issues that were neither presented to the Bureau nor the Commission in connection with the Receiver's applications for involuntary assignment. For example, Cherry now claims (Br. 29-30) that the assignment to the Receiver violates the FCC's Minority Ownership Policy, which is designed to encourage minority ownership of broadcast services. *See Promoting Diversification of Ownership in the Broadcast Services*, 23 FCC Rcd 5922 (2008). Although Cherry claimed in his Informal Complaint that Zwirn had focused on lending to minority-owned radio stations, Cherry never previously asserted that the involuntary assignment to the Receiver violated the FCC's Minority Ownership Policy. That claim is, therefore, not properly raised here. *See* 47 U.S.C. § 405(a). In any event, nothing in that policy statement exempts minority-owned broadcasters from state court debt-collection litigation or state court-ordered receiverships.

B. As An Alternative Basis For Its Decision, The FCC Acted Within its Discretion in Affirming the Bureau's Grant of the Receiver's Applications for Involuntary Assignment.

Even if, *arguendo*, the FCC had abused its discretion in dismissing the AFR on procedural grounds, the Court should affirm the *Order* on the alternative and independent ground provided by the *Order*. Specifically, the Commission found that “the staff properly decided the matters raised before it” and therefore “we uphold the staff decision for the reasons stated” in the *Bureau Order*. *See Order*, ¶ 2 (JA 5). That alternative holding affirming the Bureau's grant of the assignment of the licenses to the Receiver is rational and fully supported by precedent.

The FCC does not permit the parties to a state court receivership proceeding to relitigate the merits of the state court's decision in the course of reviewing an application for an involuntary assignment of licenses. The sole question for the agency is whether the receiver is qualified to hold the assigned licenses, not whether the initial appointment of a receiver is itself justified, or whether a different person would be a better choice. *See Arecibo Radio Corp.*, 101 F.C.C.2d 545, 548 (1985) (leaving to state court resolution of dispute concerning the authorization of signatures on an application for involuntary assignment of licenses). *See also Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing “the Commission's longstanding policy of refusing to adjudicate private contract law questions”); *Northwest Broad., Inc.*, 12 FCC Rcd 3289 (1997),

aff'd sub nom. Montierth v. FCC, 159 F.3d 636 (D.C. Cir. 1998) (*per curiam*) (the FCC historically and consistently has left questions of private contracts to local courts of competent jurisdiction); *John F. Runner, Receiver*, 36 R.R.2d (P&F) 773, 778 (1976) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private disputes).

Consistent with its longstanding policy, the FCC recognizes that the public interest is served by accommodating state courts' appointment of receivers by consenting to an involuntary assignment of FCC licenses to enable creditors to recover a portion of their investment when doing so does not interfere with a countervailing public interest. *See La Rose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974) (identifying as "[t]he broad question" "whether the public interest would best be served by permitting the receiver to continue to operate the station for a limited time in order to enable him to dispose of the asset"). To that end, the FCC's "regular practice is to approve an involuntary assignment of the license" to a state receiver or a trustee in bankruptcy. *Id.* at 1148. *See Dale Parsons, Jr.*, 10 FCC Rcd 2718, 2721 (1995); *O.D.T. Int'l (KILU (FM))*, 9 FCC Rcd 2575, 2576

(1994); *Arecibo Radio Corp.*, 101 FCC2d at 550 & n.12; *D.H. Overmyer Telecasting Co., Inc.*, 94 F.C.C.2d 117, 126 (1983).¹⁷

Here, the Commission adopted the reasoning of the Media Bureau, which recognized and applied this established policy to the Receiver's applications. *See Bureau Order*, 24 FCC Rcd at 2455 (JA 3); *Order*, ¶ 2 (JA 5). In particular, the Bureau noted that the Receiver had been duly appointed by the state court and was "qualified" to hold the assigned licenses. 24 FCC Rcd at 2455 (JA 3).

Cherry had ample opportunity to object to the appointment of a receiver in the state court proceeding. After full briefing on the issue, the state court determined that the appointment was appropriate and that Mr. Savage was qualified to serve in this role based on his long experience in the broadcast industry. State Court Appointment Order at 2 (JA 31). Based on this court-ordered appointment, coupled with Cherry's failure to demonstrate that a grant of the Receiver's applications was contrary to the public interest, the FCC did not abuse its discretion in upholding the Bureau's grant of the applications.

¹⁷ *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005), cited by Cherry (Br. 23), is not to the contrary. In *Kidd*, the challenge was not to the involuntary assignment to the court-appointed trustee (which was not contested), but to the trustee's subsequent voluntary assignment of the license to a holder of a reversionary interest in the license. This Court held that the FCC had not adequately explained its apparent deviation from its prior policy concerning reversionary interests. In *D.B. Zwirn Special Opportunities Fund, L.P.*, 550 F. Supp. 2d at 494 n.84, the court recognized that *Kidd* is inapplicable to the question of the receiver's initial appointment.

III. CHERRY’S RENEWED ATTACKS ON ZWIRN, THE FCC STAFF, AND THE VALIDITY OF THE ENFORCEMENT BUREAU CONSENT DECREE ARE NOT PROPERLY BEFORE THE COURT AND ARE IRRELEVANT.

Cherry does not directly attack the qualifications of the Receiver, but rather renews his wide-ranging attacks on Zwirn¹⁸ and the FCC’s staff.¹⁹ None of these attacks is relevant to the issue presented here: The assignment of licenses to the court-appointed Receiver.

Cherry’s focus on the qualifications of Zwirn as a potential licensee is misplaced. Rather, the relevant issue is whether *Mr. Savage* was qualified to hold the licenses as the court-appointed Receiver. As shown above, the FCC properly held that he was. *See Bureau Order*, 24 FCC Rcd at 2455 (JA 3 (“honor[ing] the New York Court Order” and “find[ing] that the Receiver is qualified to hold the

¹⁸ Among his various claims impugning Zwirn’s qualifications as a potential licensee, Cherry asserts that Zwirn engaged in “predatory” lending policies (Br. 23), misrepresented the nature of its ownership (*id.* at 22), and violated the Equal Credit Opportunity Act (*id.* at 31- 32). Cherry also contends that the FCC should have rejected the Receiver’s involuntary assignment applications because Zwirn is under investigation by the Securities and Exchange Commission (*id.* at 21-22) and a defendant in litigation pending in Florida (*id.* at 31-32).

¹⁹ Cherry reiterates his claim that the Enforcement Bureau erred in terminating its investigation of Tama and Zwirn without holding an evidentiary hearing (Br. 25-27), asserts that contacts between the FCC staff and Zwirn in connection with the Enforcement Bureau’s investigation violated the FCC’s *ex parte* rules (*id.* at 25-26), and attacks the validity of the Tama director’s signature on the consent decree (*id.* at 28-29).

Stations' licenses"); *Order*, ¶ 2 (JA 5) (upholding *Bureau Order* "for the reasons stated therein").

Contrary to Cherry's unsubstantiated claim (Br. 3, 20), Mr. Savage is not a "surrogate" or "alter ego" of Zwirn. He was duly appointed by the New York State Supreme Court and operates under its supervision. As New York's highest court has explained, "a receivership is a creature of the court . . . and functions in the place of and as the instrumentality of the court itself [T]he receiver acts solely on the court's behalf . . . and is otherwise a stranger to the parties and their dispute." *In re Kane*, 75 N.Y.2d 511, 515 (1990). Accordingly, in assessing the Receiver's applications for involuntary assignment in this case, the Commission and the Bureau correctly focused on Mr. Savage's undisputed qualifications, and not the conduct of the licensee or other parties to the state court litigation. *Cf. La Rose v. FCC*, 494 F.2d at 1146 n.2 (where a license has been involuntarily assigned to a receiver in bankruptcy, "the conduct of the previous licensee is of only indirect relevance to the renewal issue").

Moreover, the involuntary assignment to the Receiver (the issue presented here) is entirely distinct from FCC review of the Receiver's subsequent sale of the assets (an issue that is not before the Court). Cherry relies on nothing but

speculation to claim that the involuntary assignment is “merely a step” (Informal Objection at 4 (JA 88)) toward Zwirn’s ultimate takeover of the Tama licenses.²⁰

Cherry’s attacks on the conduct of the FCC staff – primarily regarding the Enforcement Bureau’s investigation – are even wider of the mark. None of these claims has any bearing on Mr. Savage’s qualifications as Receiver, and Cherry makes no effort to establish otherwise. Moreover, these ancillary attacks on earlier FCC proceedings are not properly before the Court. As an initial matter, a presumption of nonreviewability attaches to the Commission’s decision to settle an enforcement proceeding once begun. *N.Y. State Dept. of Law v. FCC*, 984 F.2d 1209, 1213-15 (D.C. Cir. 1993). Like the petitioner in *New York State Dept. of Law*, Cherry has not rebutted that presumption. Hence, the Enforcement Bureau’s decision to terminate its investigation pursuant to a consent decree is “committed to the agency’s nonreviewable discretion.” *Id.* at 1211.

Cherry’s claim that FCC staff violated the agency’s *ex parte* rules in its settlement negotiations with Zwirn and Tama is equally flawed. Cherry’s allegations of *ex parte* rule violations by the Enforcement Bureau staff are not properly before the Court on appeal from the *Order* granting the Receiver’s

²⁰ We note that, to date, the Receiver has sold only one of the licenses and that this sale was to a third party that has no relationship to Zwirn. Further, none of proposed sales of the other licenses has been to a Zwirn affiliate. *See supra* at 14-17 & n.14.

applications for involuntary assignment. Not only are the claims facially irrelevant to the *Order*, Cherry's claim of improper *ex parte* communications is barred because he did not seek full Commission review of the decisions of the Office of General Counsel staff denying his *ex parte* complaint. *See* 47 U.S.C. § 155(c)(7) (filing an application for review is "a condition precedent to judicial review" of staff action); *see Int'l Telecard Ass'n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999); *Richman Bros. Records, Inc. v. FCC*, 124 F.3d 1302 (D.C. Cir. 1997).

Even if the claim was properly before the Court, on the merits Cherry misconceives the application of the *ex parte* rules to the Enforcement Bureau's investigation. As the Office of the General Counsel explained to Cherry, he was not a party to the Enforcement Bureau's investigation into Tama and Zwirn's conduct and therefore was not entitled to notice or an opportunity to be present during the settlement negotiations between the Enforcement Bureau's staff and the targets of the investigation. *See* Letters from Joel Kaufman, FCC Associate General Counsel, to Percy Squire, dated May 8, 2009 and August 28, 2009 (JA 117, 121).

Moreover, even if Cherry was a party to the enforcement proceeding, the Enforcement Bureau's communications with the targets of its investigation to pursue settlement of the enforcement proceeding are specifically exempt from the general prohibition against *ex parte* communications and thus entirely proper. *See*

47 C.F.R. § 1.1204(a)(10) (presentation requested by FCC staff for “resolution of issues, including . . . settlement” is exempt from prohibition against *ex parte* communications in a restricted proceeding not designated for hearing); *N.Y. State Dept. of Law*, 984 F.2d at 1217-18 (holding lawful settlement discussions between FCC staff and target of investigation under the “settlement” exemption to the *ex parte* rules).

IV. CHERRY’S PROPOSED RELIEF IS BEYOND THE COURT’S JURISDICTION.

Finally, Cherry’s request for injunctive relief from this Court fails on an independent ground. Cherry asks the Court not only to vacate the *Order*, but also to: (1) unwind the state court receivership order; (2) return the licenses to Tama; (3) order the Commission to investigate Zwirn; and (4) enjoin the courts from placing the licenses into another receivership until the FCC investigation is completed. Br. 32. None of these additional judicial remedies is authorized by section 402(b) of the Communications Act or any other statutory provision. *See* 28 U.S.C § 2283 (“A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.”); *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 286-87 (1970) (“any injunction against state court proceedings

otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld”).

As with his defective pleadings before the agency, Cherry makes no effort to explain how his request for extraordinary judicial relief is supported by the law or the facts. Rather, his request follows a pattern of meritless arguments for which he previously has been admonished. *See, e.g., Cherry v. D.B. Zwirn Special Opportunities Fund. L.P.*, 2010 WL 415313 at *2 (“[Cherry’s] objection is but another filing on the mountain of paperwork caused by [his] intentional and vexatious litigation tactics.”).

CONCLUSION

For the foregoing reasons, the Court should affirm the FCC's *Order* dismissing Cherry's Application for Review for fatal procedural defects. In the alternative, the Court should affirm the *Order* on the merits.

Respectfully submitted,

AUSTIN C. SCHLICK
GENERAL COUNSEL

PETER KARANJIA
DEPUTY GENERAL COUNSEL

/s/ RICHARD K. WELCH
RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL

STEWART BLOCK
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

December 20, 2010

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GLENN CHERRY

APPELLANT

V.

FEDERAL COMMUNICATIONS COMMISSION

APPELLEE

)
)
)
)
)
)
)
)
)
)

No. 10-1151

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying “Brief for Appellee” in the captioned case contains 7413 words.

/s/ RICHARD K. WELCH

RICHARD K. WELCH
ACTING ASSOCIATE GENERAL COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

February 8, 2011

STATUTORY AND RULE APPENDIX

28 U.S.C. § 2283

47 U.S.C. § 155(c)(7)

47 U.S.C. § 310(d)

47 U.S.C. § 402(b)

47 U.S.C. § 405(a)

47 C.F.R. § 1.44

47 C.F.R. § 1.115(a-c)

47 C.F.R. § 1.1204(a)

47 C.F.R. § 73.3541

28 U.S.C. § 2283

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI. PARTICULAR PROCEEDINGS
CHAPTER 155. INJUNCTIONS; THREE-JUDGE COURTS

§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

47 U.S.C. § 155(c)(7)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER I. GENERAL PROVISIONS

§ 155. Commission

* * * * *

(c) Delegation of functions; exceptions to initial orders; force, effect and enforcement of orders; administrative and judicial review; qualifications and compensation of delegates; assignment of cases; separation of review and investigative or prosecuting functions; secretary; seal

* * * * *

(7) The filing of an application for review under this subsection shall be a condition precedent to judicial review of any order, decision, report, or action made or taken pursuant to a delegation under paragraph (1) of this subsection. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title, shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

* * * * *

47 U.S.C. § 310(d)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER III--SPECIAL PROVISIONS RELATING TO RADIO
PART I--GENERAL PROVISIONS

§ 310. License ownership restrictions

* * * * *

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

* * * * *

47 U.S.C. § 402(b)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV--PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 402. Judicial review of Commission's orders and decisions

* * * * *

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

- (1)** By any applicant for a construction permit or station license, whose application is denied by the Commission.
- (2)** By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.
- (3)** By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.
- (4)** By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.
- (5)** By the holder of any construction permit or station license which has been modified or revoked by the Commission.
- (6)** By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.
- (7)** By any person upon whom an order to cease and desist has been served under section 312 of this title.
- (8)** By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

* * * * *

47 U.S.C. § 405(a)

UNITED STATES CODE ANNOTATED
TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV. PROCEDURAL AND ADMINISTRATIVE PROVISIONS

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must

be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

47 C.F.R. § 1.44

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
PLEADINGS, BRIEFS, AND OTHER PAPERS
SEPARATE PLEADINGS FOR DIFFERENT REQUESTS.

§ 1.44 Separate pleadings for different requests.

- (a) Requests requiring action by the Commission shall not be combined in a pleading with requests for action by an administrative law judge or by any person or persons acting pursuant to delegated authority.
- (b) Requests requiring action by an administrative law judge shall not be combined in a pleading with requests for action by the Commission or by any person or persons acting pursuant to delegated authority.
- (c) Requests requiring action by any person or persons pursuant to delegated authority shall not be combined in a pleading with requests for action by any other person or persons acting pursuant to delegated authority.
- (d) Pleadings which combine requests in a manner prohibited by paragraph (a), (b), or (c) of this section may be returned without consideration to the person who filed the pleading.
- (e) Any request to stay the effectiveness of any decision or order of the Commission shall be filed as a separate pleading. Any such request which is not filed as a separate pleading will not be considered by the Commission.

Note: Matters which are acted on pursuant to delegated authority are set forth in Subpart B of Part 0 of this chapter. Matters acted on by the hearing examiner are set forth in § 0.341.

47 C.F.R. § 1.115(a-c)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART A. GENERAL RULES OF PRACTICE AND PROCEDURE
RECONSIDERATION AND REVIEW OF ACTIONS
TAKEN BY THE COMMISSION AND
PURSUANT TO DELEGATED AUTHORITY; EFFECTIVE
DATES AND FINALITY DATES OF
ACTIONS

§ 1.115. Application for review of action taken pursuant to delegated authority.

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.

(b)(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) Except as provided in paragraph (b)(5) of this section, the application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

* * * * *

47 C.F.R. § 1.1204(a)

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER A. GENERAL
PART 1. PRACTICE AND PROCEDURE
SUBPART H. EX PARTE COMMUNICATIONS
GENERAL EXEMPTIONS
EXEMPT EX PARTE PRESENTATIONS AND PROCEEDINGS.

§ 1.1204 Exempt ex parte presentations and proceedings.

(a) Exempt ex parte presentations. The following types of presentations are exempt from the prohibitions in restricted proceedings (§ 1.1208), the disclosure requirements in permit-but-disclose proceedings (§ 1.1206), and the prohibitions during the Sunshine Agenda period prohibition (§ 1.1203):

- (1) The presentation is authorized by statute or by the Commission's rules to be made without service, see, e.g., § 1.333(d), or involves the filing of required forms;
- (2) The presentation is made by or to the General Counsel and his or her staff and concerns judicial review of a matter that has been decided by the Commission;
- (3) The presentation directly relates to an emergency in which the safety of life is endangered or substantial loss of property is threatened, provided that, if not otherwise submitted for the record, Commission staff promptly places the presentation or a summary of the presentation in the record and discloses it to other parties as appropriate.
- (4) The presentation involves a military or foreign affairs function of the United States or classified security information;
- (5) The presentation is to or from an agency or branch of the Federal Government or its staff and involves a matter over which that agency or branch and the Commission share jurisdiction provided that, any new factual information obtained through such a presentation that is relied on by the Commission in its decision-making process will, if not otherwise submitted for the record, be disclosed by the Commission no later than at the time of the release of the Commission's decision;
- (6) The presentation is to or from the United States Department of Justice or Federal Trade Commission and involves a telecommunications competition matter in a proceeding which has not been designated for hearing and in which the relevant agency is not a party or commenter (in an informal rulemaking or Joint board proceeding) provided that, any new factual information obtained through such a presentation that is relied on by

the Commission in its decision-making process will be disclosed by the Commission no later than at the time of the release of the Commission's decision;

Note 1 to paragraph (a): Under paragraphs (a)(5) and (a)(6) of this section, information will be relied on and disclosure will be made only after advance coordination with the agency involved in order to ensure that the agency involved retains control over the timing and extent of any disclosure that may have an impact on that agency's jurisdictional responsibilities. If the agency involved does not wish such information to be disclosed, the Commission will not disclose it and will disregard it in its decision-making process, unless it fits within another exemption not requiring disclosure (e.g., foreign affairs). The fact that an agency's views are disclosed under paragraphs (a)(5) and (a)(6) does not preclude further discussions pursuant to, and in accordance with, the exemption.

(7) The presentation is between Commission staff and an advisory coordinating committee member with respect to the coordination of frequency assignments to stations in the private land mobile services or fixed services as authorized by 47 U.S.C. 332;

(8) The presentation is a written presentation made by a listener or viewer of a broadcast station who is not a party under § 1.1202(d)(1), and the presentation relates to a pending application that has not been designated for hearing for a new or modified broadcast station or license, for renewal of a broadcast station license or for assignment or transfer of control of a broadcast permit or license;

(9) The presentation is made pursuant to an express or implied promise of confidentiality to protect an individual from the possibility of reprisal, or there is a reasonable expectation that disclosure would endanger the life or physical safety of an individual;

(10) The presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for resolution of issues, including possible settlement, subject to the following limitations:

(i) This exemption does not apply to restricted proceedings designated for hearing;

(ii) In restricted proceedings not designated for hearing, any new written information elicited from such request or a summary of any new oral information elicited from such request shall promptly be served by the person making the presentation on the other parties to the proceeding. Information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits, shall not be deemed to be new information for purposes of this section. The Commission or its staff may waive the service requirement if service would be too burdensome because the parties are numerous or because the materials relating to such presentation are voluminous. If the service requirement is waived, copies of the presentation or summary shall be placed in the record of the proceeding and the Commission or its staff shall issue a public notice which states that copies of the presentation or summary are available for inspection. The Commission or its staff may determine that service or public notice would interfere with

the effective conduct of an investigation and dispense with the service and public notice requirements;

(iii) If the presentation is made in a proceeding subject to permit-but-disclose requirements, disclosure of any new written information elicited from such request or a summary of any new oral information elicited from such request must be made in accordance with the requirements of § 1.1206(b), provided, however, that the Commission or its staff may determine that disclosure would interfere with the effective conduct of an investigation and dispense with the disclosure requirement. As in paragraph (a)(10)(ii) of this section, information relating to how a proceeding should or could be settled, as opposed to new information regarding the merits, shall not be deemed to be new information for purposes of this section;

Note 2 to paragraph (a): If the Commission or its staff dispenses with the service or notice requirement to avoid interference with an investigation, a determination will be made in the discretion of the Commission or its staff as to when and how disclosure should be made if necessary. See Amendment of Subpart H, Part I, 2 FCC Rcd 6053, 6054 ¶¶10-14 (1987).

(iv) If the presentation is made in a proceeding subject to the Sunshine period prohibition, disclosure must be made in accordance with the requirements of § 1.1206(b) or by other adequate means of notice that the Commission deems appropriate;

(v) In situations where new information regarding the merits is disclosed during settlement discussions, and the Commission or staff intends that the product of the settlement discussions will be disclosed to the other parties or the public for comment before any action is taken, the Commission or staff in its discretion may defer disclosure of such new information until comment is sought on the settlement proposal or the settlement discussions are terminated.

(11) The presentation is an oral presentation in a restricted proceeding not designated for hearing requesting action by a particular date or giving reasons that a proceeding should be expedited other than the need to avoid administrative delay. A detailed summary of the presentation shall promptly be filed in the record and served by the person making the presentation on the other parties to the proceeding, who may respond in support or opposition to the request for expedition, including by oral ex parte presentation, subject to the same service requirement.

(12) The presentation is between Commission staff and:

(i) The administrator of the interstate telecommunications relay services fund relating to administration of the telecommunications relay services fund pursuant to 47 U.S.C. 225;

(ii) The North American Numbering Plan Administrator or the North American Numbering Plan Billing and Collection Agent relating to the administration of the North American Numbering Plan pursuant to 47 U.S.C. 251(e);

(iii) The Universal Service Administrative Company relating to the administration of universal service support mechanisms pursuant to 47 U.S.C. 254; or

(iv) The Number Portability Administrator relating to the administration of local number portability pursuant to 47 U.S.C. 251(b)(2) and (e); provided that the relevant administrator has not filed comments or otherwise participated as a party in the proceeding.

* * * * *

47 C.F.R. § 73.3541

CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER C. BROADCAST RADIO SERVICES
PART 73. RADIO BROADCAST SERVICES
SUBPART H. RULES APPLICABLE TO ALL BROADCAST STATIONS
APPLICATION FOR INVOLUNTARY ASSIGNMENT OF LICENSE OR TRANSFER
OF CONTROL.

§ 73.3541 Application for involuntary assignment of license or transfer of control.

(a) The FCC shall be notified in writing promptly of the death or legal disability of an individual permittee or licensee, a member of a partnership, or a person directly or indirectly in control of a corporation which is a permittee or licensee.

(b) Within 30 days after the occurrence of such death or legal disability, an application on FCC Form 316 shall be filed requesting consent to involuntary assignment of such permit or license or for involuntary transfer of control of such corporation to a person or entity legally qualified to succeed to the foregoing interests under the laws of the place having jurisdiction over the estate involved.

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Glenn Cherry, Appellant,

v.

Federal Communications Commission, Appellee,

CERTIFICATE OF SERVICE

I, Richard K. Welch, hereby certify that on February 8, 2011, I electronically filed the foregoing Brief for Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Some of the participants in the case, denoted with asterisks below, are not CM/ECF users. I certify further that I have directed that copies of the foregoing document be mailed by First-Class Mail to those persons, unless another attorney at the same mailing address is receiving electronic service.

Dennis Joseph Kelly
Law Office of Dennis J. Kelly
P.O. Box 41177
Washington, D.C. 20018
Counsel for: Dr. Glenn Cherry

*Mark J. Prak
Julia Ambrose
Eric M. David
Brooks, Pierce, McLendon,
Humphrey & Leonard, L.L.P.
Wachovia Capitol Center
P.O. Box 1800
Raleigh, NC 27602
*Counsel for: Scott Savage,
Receiver*

/s/ Richard K. Welch